No. 87-1482

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

J. R. MASTELOTTO, HUMBOLDT OIL COMPANY, and BONUS INTERNATIONAL CORPORATION, Petitioners,

v.

EXXON COMPANY, U.S.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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WRIT OF CERTIORARI

Petitioners J. R. MASTELOTTO, HUMBOLDT OIL COMPANY, and BONUS INTERNATIONAL CORPORATION, file this Petition for Writ of Certiorari asking the Supreme Court of the United States to review the decision of the Court of Appeals for the Ninth Circuit reversing a judgment entered by the United States District Court for the State of Nevada. Set forth below is the information required by Rule 21 of the Revised Rules of Supreme Court of the United States in support of this Writ:

(a) QUESTION PRESENTED

Is there any basis for the Ninth Circuit Court of Appeals' finding that the application of California law in this case frustrates federal objectives, or is such finding so unsupported by fact, law, or logic, as to render the Court of Appeals' reversal of the District Court's judgment a violation of Due Process?

(b) PARTIES

Petitioners in this case are J. R. MASTELOTTO ("MASTELOTTO"), HUMBOLDT OIL COMPANY ("HUMBOLDT"), and BONUS INTERNATIONAL CORPORATION ("BONUS"). MASTELOTTO is now and was at all times relevant the sole shareholder of BONUS, which, in turn, is the sole shareholder and parent of HUMBOLDT.

Respondent is EXXON COMPANY, U.S.A. ("EXXON").

(c)(1) TABLE OF CONTENTS

(c)(2) TABLE OF AUTHORITIES

CASES

STATUTUES

(d) OPINION OF COURT BELOW

The decision and Opinion of the Ninth Circuit Court of Appeals sought to be reviewed by this Writ of Certiorari is reported as follows: *Humboldt v. Exxon,* 823 F. 2d 373 (9th Cir. 1987), a copy of which is attached hereto as Appendix A(1). A copy of the District Court's Order denying EXXON's Motion For A New Trial Or Judgment N.O.V. is attached hereto as Appendix A(2).

(e) JURISDICTION

(i) The judgment sought to be reviewed by this Writ of Certiorari was entered by the Court of Appeals for the Ninth Circuit on July 30, 1987.

(ii) Petitioners' Petition for Rehearing was denied by order filed by the Court of Appeals for the Ninth Circuit on September 10, 1987. (A copy of this Order is attached hereto as Appendix B.)

(iii) No cross-petition for writ of certiorari has been or is expected to be filed.

(iv) Jurisdiction of this Court to review by Writ of Certiorari the Ninth Circuit Court of Appeals' judgment in this case arises pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

(f) PERTINENT STATUTES

In arriving at its judgment, the Ninth Circuit Court of Appeals concluded that application of Section 21148 of the California Business and Professions Code to the facts of this case was preempted by the federal Petroleum Marketing Practices Act (15 U.S.C. 2800 *et seq.).* As both these statutes are lengthy, the pertinent portions are appended hereto as Appendix C(1) and Appendix C(2), respectively.

(g)-(i) STATEMENT OF CASE

J. R. MASTELOTTO and HUMBOLDT OIL COMPANY ("HUMBOLDT/MASTELOTTO") operated a petroleum distributorship pursuant to franchise agreements with EXXON

U.S.A., INC. ("EXXON"). By notice issued in November, 1981, EXXON terminated HUMBOLDT/MASTELOTTO's franchise agreemments, effective February 28, 1982. This date was subsequently extended to May 28, 1982.

In January, 1982—after EXXON had issued its notice of termination but before the effective date of that notice and at a time when the legality of that action was still being disputed in the courts—HUMBOLDT/MASTELOTTO entered into an agreement with a Mr. Steve Beneto, owner of Beneto, Inc., to assign to them ("BENETO") its franchise agreements with EXXON in exchange for $25,000.00. There was a collateral agreement that, once BENETO succeeded to HUMBOLDT/MASTELOTTO's franchise, the former would appoint the latter as one of their EXXON dealers.

EXXON refused to approve HUMBOLDT/MASTELOTTO's contemplated assignment of its franchise agreements to BENETO, giving rise to a claim by HUMBOLDT/MASTELOTTO against EXXON for violation of Section 21148 of the California Business and Professions Code.(1) This statute essentially provides that a franchisor (such as EXXON) cannot withhold its consent to the assignment of a petroleum franchise (such as is involved in this case) unless it can demonstrate that the prospective assignee does not meet its uniformly adopted requirements or that it was not first afforded an opportunity to purchase the franchise itself upon trial. EXXON failed to make such a showing and the jury returned a verdict in the amount of $750,000.00 (2) in favor of HUMBOLDT/MASTELOTTO on account OF EXXON's violation of Section 21148. The District Court denied EXXON's Motion For A New Trial Or For Judgment N.O.V., upheld the jury's verdict on the foregoing claim, and entered judgment accordingly.

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(1) This claim was filed as part of a Cross-Complaint in an action already pending in the United States District Court for the division of Nevada (Reno). The District Court had jurisdiction over the claim pursuant to 28 U.S.C. §1332 (diversity of citizenship), as well as by virtue of the doctrines of pendant and concurrent jurisdiction.

(2) Pursuant to Section 21140.4 of the California Business and Professions Code HUMBOLDT/MASTELOTTO was entitled to treble its actual damages.

As detailed below, this judgment was reversed by the Ninth Circuit Court of Appeals based upon a finding which is completely unsupported in fact, law, or logic. Petitioners truly come to you, therefore, as the court of last resort, not to resolve decisional conflicts or established precedent, but to correct a grevious and clear-cut wrong which only you can rectify. This wrong—in a jurisprudential sense—lies not so much in the result wrought by Ninth Circuit Court of Appeals, as it does in the fact that this result has no basis whatsoever in fact or reason, and accordingly, must be deemed to have been arrived at in violation of Petitioner's Due Process rights.

(j) ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI

I
INTRODUCTION: THE COURT'S OPINION OVERLOOKS CERTAIN CONTRACTUAL AND STATUTORY PROVISIONS VITIATING THE FINDING UPON WHICH IT IS BASED

The Ninth Circuit's Opinion holds that the Petroleum Marketing Practices Act ("PMPA", 15 U.S.C. §2801 *et seq.)* preempts application in this case of California's assignment law relating to petroleum franchises (Section 21148 of the California Business and Professions Code). This decision is expressly predicated by the Court of Appeals on its finding that to allow "Mastelotto to assign his franchise rights to Beneto (with whom he had a collateral agreement whereby Mastelotto would remain an Exxon dealer) would effectively deny Exxon its PMPA right to disassociate itself from Mastelotto". *Humboldt v. Exxon,* 823 F.2d 373 (9th Cir. 1987), at page 375. This finding not only overlooks, but runs squarely counter to, certain contractual and statutory provisions which make clear that the assignment in question, even if considered in conjunction with the aforementioned collateral agreement, could not possibly have prevented EXXON from disassociating itself from HUMBOLDT/MASTELOTTO. The contractual provisions referred to are those set forth in Paragraph 13 of the very

distributorship agreements sought to be assigned, and the statutory provision in Section 21148(3) of the California Business and Professions Code.

II

DISCUSSION: THE OVERLOOKED CONTRACTUAL AND STATUATORY PROVISIONS MAKE IT IMPOSSIBLE FOR HUMBOLDT/MASTELOTTO TO HAVE SERVED AS AN EXXON DEALER AGAINST EXXON'S WISHES

A. Overlooked Contractual Provisions

No one can use EXXON's trade name, trademark, brand name, label, insignia, symbol or imprint without EXXON's ultimate permission. (See, generally, 15 U.S.C. §1114 (1) and California Business and Professions Code §14320(a).)

EXXON's distributor agreements – such as those sought to be assigned by HUMBOLDT/MASTELOTTO to BENETO in this case – do allow the distributor himself to "brand" customers (that is, authorize them to use the EXXON name and mark) but only pursuant to provisions which effectively reserve to EXXON the right to compel those customers to discontinue such brand identification at any time. This is accomplished by requiring the distributor to obtain agreements from his customers that they will cease using the EXXON "trade name, trademark, brand name, label, insignia, symbol or imprint . . . immediately . . . upon demand by [EXXON]." See the highlighted portions of Paragraph 13 of EXXON's distributor agreements with HUMBOLDT/MASTELOTTO, attached hereto as Appendix D [Exhibits 2 and 3 at Trial].

In light of the foregoing contractual provisions, there is simply no way the assignment of HUMBOLDT/MASTELOTTO's distributor agreements with EXXON could have frustrated the latter's desire to dissociate itself from the former, even given the collateral agreement with BENETO to make HUMBOLDT/MASTELOTTO an EXXON dealer, since that agreement could not have been implemented except with EXXON's approval.

It should be added that BENETO's power to appoint HUMBOLDT/MASTELOTTO as an EXXON dealer pursuant to the distributor agreements sought to be assigned to him would have, in any event, only lasted as long as HUMBOLDT/MASTELOTTO's right to remain an EXXON distributor under those agreements—that is, until the effective termination date of the agreements. Thus, even if EXXON did not exercise its contractual rights under Paragraph 13 of the distributor agreements to prevent HUMBOLDT/MASTELOTTO from serving as an EXXON dealer, the assignment of those agreements would not have prolonged EXXON's association with HUMBOLDT/MASTELOTTO one iota. Indeed, it is ironic but true, that the assignment in question, far from posing any impediment to EXXON's desire to disassociate itself from HUMBOLDT/MASTELOTTO would actually have facilitated it since, after the assignment, EXXON could immediately have taken steps to prevent HUMBOLDT/MASTELOTTO from using the EXXON name and mark instead of having to wait for the distributor agreements to terminate.

B. Overlooked Statutory Provisions

Section 21148 of the California Business and Professions Code expressly allows petroleum franchisors, such as EXXON, to disapprove proposed assignments for virtually any reason, as long as uniformly applied. See, especially, subparagraph (a)(3) of Section 21148, attached hereto as Exhibit C(1). Thus, there is no way Section 21148 can be employed to defeat a franchisor's desire to disassociate itself from any particular person: The franchisor need only refuse to approve any assignment which might, directly or indirectly, involve it in an undesired association, or the franchisor can simply condition its approval on the absence of any such involvement. As it relates to this case, EXXON, pursuant to Section 21148, could have conditioned its approval of the assignment at issue on BENETO refraining from "branding" HUMBOLDT/MASTELOTTO as an EXXON dealer. In this manner, EXXON could readily have complied with Section 21148 without sacrificing its acknowledged PMPA right to disassociate itself from HUMBOLDT/MASTELOTTO. Under these

circumstances, it is difficult to see how the PMPA can be said to preempt the application of Section 21148 in this case.

III

CONCLUSION: THE ASSIGNMENT IN THIS CASE SIMPLY COULD NOT HAVE PREVENTED EXXON FROM EFFECTIVELY DISASSOCIATING ITSELF FROM HUMBOLT/MASTELOTTO

There is no quarrel with the premise that EXXON has the right to disassociate itself from HUMBOLDT/MASTELOTTO. However, it is respectfully submitted that the Ninth Circuit failed to demonstrate how the assignment herein at issue would or could have frustrated that right. Certainly, the collateral agreement entered into between BENETO and HUMBOLDT/MASTELOTTO would not have caused it to do so (irrespective of what the parties or their counsel may have thought); for, as discussed above, Paragraph 13 of the very distributor agreements sought to be assigned gives EXXON the right to stop any customer or the distributor from using the EXXON brand against its wishes. Additionally, pursuant to subparagraph (a)(3) of Section 21148, EXXON could have conditioned approval of the assignment in question on BENETO not implementing the collateral agreement. Thus, there is absolutely no basis in fact or law for the finding by the Ninth Circuit which gave rise to its decision. Indeed, that finding is directly contrary to the evidence and applicable law of the case.

(k) APPENDIX

Attached hereto are the following Appendix items:

Appendix A(1):

Humboldt v. Exxon, 823 F.2d 373 (9th Cir. 1987)

Appendix A(2):

Order Denying Judgment N.O.V. Or For A New Trial

Appendix B:

Order Denying Petition For Rehearing dated September 10, 1987

Appendix C(1):
California Business and Professions Code, Section 21148
Appendix C(2):
15 U.S.C. §2800 *et seq.*
Appendix D:
Paragraph 13 of Exxon Distributor Agreement with Humboldt/Mastelotto

Respectfully submitted,
SPINETTA, RANDICK & O'DEA

By: Peter L. Spinetta
Peter L. Spinetta
Attorneys for Petitioners
J. R. MASTELOTTO, HUMBOLDT OIL COMPANY and
BONUS INTERNATIONAL CORPORATION

APPENDIX

APPENDIX A (1)

CONTRACTS

Cite as 87 Daily Journal D.A.R. 4746

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-1916;
86-1956

D.C. No.
R-82-29-BRT

OPINION

Humboldt Oil Co., Inc. and J.R. Mastelotto,
Plaintiffs,

v.

Exxon Company, U.S.A.,
Defendant.

Exxon Company, U.S.A.
Cross-Complainant/Appellant/Appellee,

v.

Humboldt Oil Co., Inc. and J.R. Mastelotto,
Cross-Defendants/Appellees/Appellants,

and

Bonus International Corporation,
Cross-Defendant/Appellee.

Argued and Submitted
May 12, 1987—San Francisco, California

Filed July 30, 1987

Before: Otto R. Skopil, Jr., Jerome Farris and
Diarmuid F. O'Scannlain, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding

COUNSEL

Peter L. Spinetta, Oakland, California, for the plaintiffs/cross-defendants/appellees/appellants.

John R. Reese, San Francisco, California for the defendant/cross-complainant/appellant/appellee.

OPINION

PER CURIAM:

Exxon appeals a $750,000 judgment for damages for violation of California Business and Professions Code § 21148 entered on a jury verdict for Humboldt/Mastelotto/Bonus. Humboldt/Mastelotto cross-appealed. Because we find that application of such statute is preempted by federal law, we reverse the judgment for Humboldt/Mastelotto/Bonus and dismiss the cross-appeals.

BACKGROUND

Jerry Robert Mastelotto and his corporation, Humboldt Oil ("Humboldt/Mastelotto"), purchased Exxon products under franchise agreements for resale. Mastelotto and Bonus International("Bonus"), another of his corporations, executed security agreements as guarantors of the Exxon purchases. In 1981 Mastelotto was convicted of fraud in the sale of mislabeled and misbranded motor oil. *United States v. Mastelotto,* No. 80-0454-01 (N.D. Cal. 1983): *see Humboldt Oil Co. v Exxon,* 532 F. Sup. 896, 898 (D. Nev. 1982). Because of the conviction, Exxon terminated its franchise agreement pursuant to the Petroleum Marketing Practice Act ("PMPA"), 15 U.S.C. §§ 2802(b)(2)(C) and 2802(c)(12)(1982). Humboldt/Mastelotto began the present action when they secured a preliminary injunction enjoining the termination. *Humboldt v Exxon,* 532 F. Supp. at 901. That injunction was vacated by this court. *Humboldt v. Exxon,* 695 F.2d 386, 389-90 (9th Cir. 1982).

Mastelotto alleged that Exxon orally agreed to assignment of the franchise, which was prohibited in the written instrument. However, when Mastelotto offered the franchise to Exxon under a franchise agreement right-of-first refusal, Exxon did not accept.

Mastelotto planned to sell and to assign the franchise to Steve Beneto, with whom he had a collateral agreement under which Mastelotto would purchase petroleum products for retail resale. Mastelotto would thus remain an Exxon dealer.

After the franchise termination notice, Mastelotto/Humboldt stopped paying for petroleum products received and ultimately owed Exxon $816,000. Exxon filed a cross-complaint for money

due, joining Bonus as defendant guarantor. Humboldt/Mastelotto cross sued alleging, *inter alia,* Exxon's breach of an oral contract to accept an assignment of Humboldt/Mastelotto distributorships, intentional interference with prospective economic advantage, and violation of the California Franchise Dealer's Fair Practices Act, Cal. Bus. & Prof. Code § 21148 (West 1987).

A three-day jury trial on the cross-claims resulted in an $816,000 verdict for Exxon for the amount due it for the products Humboldt/Mastelotto had received. The same jury awarded Humboldt/Mastelotto $1 each on their claims for breach of contract and intentional interference with prospective business relationships. On the claim under the California Franchise Dealers' Fair Practices Act, Cal. Bus. & Prof. Code § 21148, the jury awarded Humboldt/Mastelotto damages of $750,000. The court offset the awards. From this finding Exxon appeals.

JURISDICTION

Jurisdiction of the district court is based upon diversity, 28 U.S.C. § 1332, and PMPA, 15 U.S.C. § 2805. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review the interpretation of federal and state laws, including the preemption issue, *de novo. Matter of McLinn,* 739 F.2d 1395, 1397 (9th Cir. 1984)(en banc); *Atlantic Richfield Co. v. Herbert,* 806 F.2d 889, 891 (9th Cir. 1986).

ANALYSIS

The Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2802 *et seq.,* was intended to provide a single, uniform set of rules governing termination and non-renewal of petroleum franchises to reduce friction between franchisors and franchisees in marketing of motor fuels. S. Rep. No. 731, 95th Cong., 2d Sess. 19 (hereinafter S. Rep.), *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 877. *See Huth v. B.P. Oil, Inc.,* 555 F. Supp. 191, 194 (D. Md. 1983). State Law relating to franchise termination is specifically preempted. 15 U.S.C. § 2806(a). "In enacting the PMPA, Congress

attempted to provide national uniformity of petroleum franchise termination law. The purpose of uniformity would be frustrated if the PMPA was not given its preemptory intent. Accordingly, we find the PMPA preempts all inconsistent state law." *Herbert,* 806 F.2d at 892.

Congress did not intend either to authorize or to prohibit franchise assignments, but, as a general rule, left the matter to state law. S. Rep. *supra* at 901. However, the legislative history indicates that Congress anticipated potential conflict between federal termination and state assignment provisions and suggested a method of reconciliation:

> For example, it is not intended that a franchisee may avoid the consequences of his own conduct which gave rise to a notice of termination or non-renewal by merely assigning his franchise after having been notified by the franchisor of the franchisor's intent to terminate or fail to renew. Such a result would not be countenanced under general principles of equity.

Id. To the extent that the applications of state law frustrate federal objectives, they are preempted. *See Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978). *See also Herbert,* 806 F.2d at 892 (PMPA preempts inconsistent state law). We are directed to harmonize the competing interests on a case-by-case basis. S. Rep., *supra* at 901.

[3] In this case, allowing Mastelotto to assign his franchise rights to Beneto (with whom he had a collateral agreement whereby Mastelotto would remain an Exxon dealer) would effectively deny Exxon its PMPA right to disassociate itself from Mastelotto. *See* 15 U.S.C. §§ 2802(b)(2)(C) and 2802(c)(12)(permitting termination of a franchise agreement if franchisee is convicted of a crime involving moral turpitude). California law authorizing treble damges for refusal to accept assignment of a petroleum franchise under notice of termination when that assignment would effectively avoid termination clearly is an obstacle to accomplishment of Congress' undisputed interest in a national, uniform policy for petroleum franchise termination. Therefore, we conclude that in this situation PMPA preempts California law. Accordingly, judgment for Humboldt/Mastelotto under Cal. Bus. & Prof. Code § 21148 is reversed and their cross-appeals are dismissed.

Since we dispose of this case on preemption grounds, we do not reache other issues raised by the parties. We remand to the district court for vacation of its order offsetting judgments.

APPENDIX A(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

HUMBOLDT OIL CO., INC., and MASTELOTTO,
Plaintiffs,
vs.
EXXON COMPANY, U.S.A.,
Defendant.

Civil R-82-29 BRT

EXXON COMPANY, U.S.A.,
Cross-Complainant,
vs
HUMBOLDT OIL CO., INC., BONUS INTERNATIONAL CORPORATION, and J. R. MASTELOTTO,
Cross- Defendants.

ORDER DENYING JUDGMENT N.O.V.
OR FOR A NEW TRIAL

Plaintiff Exxon has made a motion for judgment notwithstanding the jury verdicts in favor of Humboldt/Mastelotto (H/M) on three counterclaims. Joined therewith are motions for new trials.

The motions assert issues which are made solely on the basis of the insufficiency of the evidence and on legal questions regarding the applicability of California Business & Professional Code (B&P) §21148. No issue is raised regarding the propriety of the Court's instructions to the jury. Defendant H/M opposes the motion but seeks no affirmative relief. This order will ignore the jury verdicts of $1.00 each on the breach of contract claims and the claim for intentional interference with prospective economic advantage as de minimis non curat lex.

On the second counterclaim for violation of B&P §21148 the jury

returned a verdict for H/M for $750,000.00. This section provides:

> §21148. Petroleum franchises; grounds for withholding consent to transfer; transfer fee
>
> (a) Notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or assignment of the franchise by the franchisee to another person unless the franchisor demonstrates any of the following:
>
> (1) The proposed purchaser of the franchise has less business experience and training than that normally required by the franchisor of prospective franchisees.
>
> (2) The proposed purchaser of the franchise has less financial resources than that normally required by the franchisor of prospective franchisees.
>
> (3) The proposed purchaser of the franchise does not satisfy the then-current uniformly applied requirements, if any, of the franchisor applicable to prospective franchisees.
>
> (4) The proposed purchaser of the franchise operates a franchise under an agreement with a franchisor other than the franchisor to whom the sale, transfer, or assignment is proposed, if the then-current uniformly applied requirements, if any, of the franchisor precludes prospective franchisees from operating a franchise under an agreement with another franchisor.
>
> (5) The franchisee has not offered in writing to sell, transfer, or assign the franchise to the franchisor on terms and conditions which are the same as those of the sale, transfer, or assignment of the franchise to the proposed purchaser, and the franchisee has not allowed the franchisor at least 30 days in which to accept or decline the franchisee's written offer, prior to the sale, transfer, or assignment of the franchise to the proposed purchaser.
>
> (b) If the franchisor consents to the sale, transfer, or assignment of the franchise to a prospective purchaser, the franchisor may require the franchisee to pay a transfer fee to the franchisor, provided the amount of the fee is reasonable when compared to the sale price of the franchise and provided the fee is not required in an

effort to frustrate the proposed sale.

Treble damages were allowed pursuant to B&P §21140.4 which provides:

> §21140.4 Actions; jurisdiction, treble damages, attorney fees and costs
>
> Any person who is injured in his business or property by reason of a violation of this chapter may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded attorneys' fees together with the costs of the suit. Any action brought pursuant to this section shall be commenced within four years after the cause of action accrued.

For many years H/M had operated in California and Nevada as a qualified Exxon distributor. Each of the two distributor agreements was expressly non-assignable and neither had a territorial limitation. The non-assignability restriction is enforceable under Nevada law but not under California law (§21148). The agreements were governed in part by the federal Petroleum Marketing Act which deals specifically with the termination of petroleum franchises. 15 U.S.C. § 2801 et. seq. Section 2802 provides that no franchisor may temrinate or fail to renew a franchise unless such termination "is based upon a ground described in paragraph (2)." Paragraph (2) provides: "For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise or nonrenewal of a franchise relationship: . . . (c)(12) conviction of the franchisee of any felony involving moral turpitude." Section 2806 of the Petroleum Marketing Act provides: "(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise authorized by the provisions of such franchise or by any applicable provisions of state law which permits such transfer or assignment." Accordingly, the Court has held in this case that while the termination of the franchise agreements was controlled by the Petroleum Marketing Act, the transfer or assignment of the agreements was controlled by applicable state law.

Defendants argue first that the correct application of choice of law principles requires that this action be governed by Nevada law. If this contention is sustained the non-assignability clauses of the franchise agreements are enforceable. If California law governs, they are not.

A federal court must apply the choice of law rules of the forum in which it sits. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In order to select the proper rule, the nature of the action must be determined. Section 21140.4 of the B&P grants a private cause of action for treble damages to "any person who is injured in his business or property by reason of a violation of [Franchise Dealers Fair Practices Act, §§21140 et. seq.] . . . " While no cases have yet interpreted this section, the right of action is identical to that provided by federal law for violations of federal antitrust laws, *see* 15 U.S.C. § 15(a). It is well-settled that such an action sounds in tort. *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 634 and cases cited in n. 5 (1980).

The court previously decided that Nevada would utilize the Second Restatement's "most significant relationship" choice of law analysis, and through the application of that modern rule determined that California's Franchise Dealers Fair Practices Act applied to this case. The court stands by this result, and now adds that the same result is reached under the First Restatement. Under this traditional conflict of law analysis, the law of the place of the wrong governs the action. This may be the Nevada law, also. In *Southern Pacific Transportation Co. v. the United States*, 462 F.Supp. 1227 (D.C.E.D. Cal. 1978), Judge McBride thoroughly analysed the Nevada conflicts of laws precedents and concluded that the principle of lex loci delictus commissi was controlling under Nevada law. Restatement of Conflict of Laws § 378 et. seq. (1934). The place of the wrong is where the last event necessary to render the defendant liable occurred. *Id.* §377. The last event in this case would be injury to plantiffs' business or property. B&P §21140.4. Although most of the plaintiffs' service stations were located in Nevada, it is beyond dispute that at all relevant times plaintiffs' business was rooted and headquartered in California.

The two franchise agreements were negotiated in California between H/M in Oroville, California and Exxon's California regional office. The conviction of Mastelotto which resulted in termination occurred in California. The notices of termination

were hand delivered by Exxon's regional manager to H/M in Oroville. The administrative proceedings were begun in California and concluded in Texas. The refusal to approve the transfer of the franchise agreements occurred in California. It is in California that plaintiffs' business suffered the consequences of defendant's conduct. *Cf. Albert Levine Associates v. Bertoni & Cotti*, 314 F.Supp. 169, 170-171 (S.D.N.Y. 1970).

Exxon argues the California cause of action is counter to Nevada public policy. The fact that the Nevada legislature has not enacted anything exactly like §21148 is of no concern. Nevada does have an Unfair Trade Practices Act which creates a remedy for its violation identical to that pursued here. *Compare* N.R.S. 598A.210(2) *with* B&P §§21140.4, 17070 and 17082. "A mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of another." Restatement of Conflict of Laws § 612 comment b. The existence of a treble damages penalty provision in N.R.S. 598A.210(2), combined with the approval of exemplary damages generally in N.R.S. 42.010 indicates the California cause of action is not inconsistent with Nevada public policy. The California Franchise Dealers Fair Practices Act governs the rights of the parties in this case.

Exxon's other principle contention is that the verdict of the jury is not supported by the evidence and is contrary to the preponderance of the evidence. This is not true. The evidence in this case supports the following scenario which apparently was believed by the jury.

H/M consummated two distributorship agreements with Exxon for the term April 1, 1981 to March 31, 1984. On or about November 20, 1981, two letters were hand delivered by G. A. Gallaher, Exxon's district manager, to Mastelotto notifying the latter that the two franchise agreements were terminated effective on February 28, 1982 because Mastelotto had been convicted of a felony involving moral turpitude. Exxon maintained a distributor grievance procedure (Ex. 8) which Mastelotto elected to pursue and the district level review of the termination action was held on October 30, 1981, attended by Gallaher and Catlin for Exxon, and Mastelotto and Thatcher for the franchisee. The principle subject of the discussion was Mastelotto's intention to disassociate himself from the business so that the termination letters could be revoked.

No relief was granted and H/M requested review by the Headquarters Distributor Relations Committee. This meeting was held on December 10, 1981 with Mastelotto, his attorney Spinetta, and Mr. Thatcher representing H/M, and Mr. Butler, Mr. Locher, Mr. Rucker, Mr. Steen, Mr. Randolph and Mrs. Sandison representing Exxon (Ex. 57). All suggested solutions were rejected except that H/M's time to "liquidate his business" was extended three months until May 28, 1982. This conclusion was communicated to Mastelotto. The latter contended that the liquidation of the business included the sale and transfer of the franchise agreements. Exxon's representatives contended that it applied only to the disposition of H/M's properties. Mastelotto's interpretation appears more reasonable inasmuch as H/M needed no help from Exxon to obtain an extension of time to sell the assets. Exxon's assistance was needed only for an extension of time to negotiate a transfer of the franchise agreements with or without the assets.

Prior to March 4, 1982, H/M received an offer from Steve Bonito, an Exxon distributor in Sacramento, California, to purchase H/M's franchises for $250,000. Pursuant to section 21148 of the B&P this offer was communicated to Exxon by certified mail (Ex. 13). On March 25, 1982, this offer was rejected by District Manager Gallaher by letter stating "we do not believe that you have anything to offer and in any event, Exxon does not accept your offer."

Mr. Locher and another official of Exxon met Steve Bonito in Dallas, Texas on February 23, 1982. Bonito told them that he had an opportunity to buy the H/M franchises. The reply was that Mastelotto had nothing to sell and that the contracts terminated on February 28th. Exxon's interpretation of the December 10, 1981 "extension of time" is reiterated in Ex. 15, a letter dated March 25, 1982 to Spinetta from Sue Rucker, Exxon's general counsel.

On March 11, 1982, Steve Bonito wrote Gallaher (Ex.14) that "I have withdrawn my offer" to Mastelotto "because I understand he does not have a contract with Exxon." The primary import of this letter is that it confirms that Bonito had in fact made the offer referred to in Exhibit 13.

We believe that they jury may have reasonably concluded from the foregoing evidence that after making an agreement extending Mastelotto's time to May 28, 1982 to sell his franchises, Exxon disregarded the agreement and told Bonito that H/M had nothing

to sell and persuaded Bonito to write Gallaher that his offer to Mastelotto was withdrawn. Thus Exxon obstructed and prevented any formal presentation of such an offer to it as a supplement to the notification in Exhibit 13.

Testimonial assertions after the fact that Exxon would not have approved the proposed sale to Bonito in any event are speculative and highly suspect, such as the claim that it would not approve a non-resident distributor.

Inasmuch as we conclude that there is evidence to support the verdicts and they are not contrary to law,

IT HEREBY IS ORDERED that the motion of Exxon for a judgment notwithstanding the verdict or for a new trial, is denied.

DATED March 3, 1986.

UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
Sep 10, 1987
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMBOLDT OIL CO., INC. and
J. R. MASTELOTTO,

Plaintiffs,

v.

EXXON COMPANY, U.S.A.,

Defendant.

Nos. 86-1916/1956

DC No.
R-82-29-BRT

ORDER

EXXON COMPANY, U.S.A.,
Cross-Complainant/Appellant/Appellee,
v.
HUMBOLDT OIL COMPANY, INC. and
J. R. MASTELOTTO,
Cross- Defendants/Appellees/Appellants,
and
BONUS INTERNATIONAL
CORPORATION,
Cross-Defendant/Appellee.

Before: SKOPIL, FARRIS, and O'SCANNLAIN, Circuit Judges

The Petition for Rehearing is DENIED.

APPENDIX C (1)

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§21148. Witholding of consent to sale, transfer, or assignment of franchise; Transfer fee.

(a) Notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or assignment of the franchise by the franchisee to another person unless the franchisor demonstrates any of the following:

(1) The proposed purchaser of the franchise has less business experience and training than that normally required by the franchisor of prospective franchisees.

(2) The proposed purchaser of the franchise has less financial resources than that normally required by the franchisor of prospective franchisees.

(3) The proposed purchaser of the franchise does not satisfy the then-current uniformly applied requirements, if any, of the franchisor applicable to prospective franchisees.

(4) The proposed purchaser of the franchise operates a franchise under an agreement with a franchisor other than the franchisor to whom the sale, transfer, or assignment is proposed, if the then-current uniformly applied requirements, if any, of the franchisor precludes prospective franchisees from operating a franchise under an agreement with another franchisor.

(5) The franchisee has not offered in writing to sell, transfer, or assign the franchise to the franchisor on terms and conditions which are the same as those of the sale, transfer, or assignment of the franchise to the proposed purchaser; and the franchisee has not allowed the franchisor at least 30 days in which to either accept or decline the franchisee's written offer, prior to the sale, transfer, or assignment of the franchise to the proposed purchaser.

(b) If the franchisor consents to the sale, transfer, or assignment of the franchise to a prospective purchaser, the franchisor may require the franchisee to pay a transfer fee to the franchisor, provided the amount of the fee is reasonable when compared to the sale price of the franchise and provided the fee is not required in an effort to frustrate the proposed sale.

APPENDIX C (2)

PETROLEUM MARKETING PRACTICES

§2806. Relationship of statutory provision to State and local laws
(a) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.
(b) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.
(June 19, 1978, P.L. 95-297, Title I, § 106, 92 Stat. 332.)

APPENDIX D

Paragraph 13 of Humboldt/Mastelloto Distributor Agreements (Trial Exhibits 2 and 3]

13. TRADEMARKS: Buyer is permitted to display Seller's trademarks solely to designate the origin of said products and Buyer agrees that petroleum products of others will not be sold by Buyer under any trade name, trademark, brand name, label, insignia, symbol, or imprint owned by Seller or used by Seller in its business. Upon termination of this Agreement or prior thereto upon demand by Seller, Buyer shall discontinue the posting, mounting, display or other use of said names, marks, labels, insignia, symbols, or imprints except only to the extent they appear as labels or identification on products manufactured or sold by Seller and still in the containers or packages designed and furnished by Seller. Buyer is not a licensee of Seller's trademarks and shall not mix, commingle, adulterate, or otherwise change the composition of any of the products purchased hereunder and resold by Buyer under said names, marks, labels, insignia symbols, or imprints. Seller is hereby given the right to examine at any time, and from time to time, the contents of Buyer's tanks or containers in which said product(s) purchased hereunder are stored and take samples therefrom, and if in the opinion of Seller any samples thus taken are not said product(s) and in the condition in which delivered by Seller to Buyer, then Seller may at its option cancel and terminate this Agreement. If there shall be posted, mounted, or otherwise displayed on or in connection with the premises any sign, poster, placard, plate, device or form of advertising matter whether or not received from Seller, consisting in whole or in party of the name of Seller or any other trade name, trademark, brand name, label, insignia, symbol or imprint owned by Seller or used by Seller in its business, Buyer agrees at all times to display same properly and to discontinue the posting, mounting or display of same immediately upon Buyer's ceasing to sell Seller's branded motor fuel (or other brands or products of Seller) or in any event upon demand by Seller. Buyer further agrees to take no action which will diminish or dilute the value of such trademarks or other identifications owned or used by the Seller.

In furtherance of its obligations as set forth in the preceding

sentence of this Section, Buyer agrees that it will for itself, and as to any of its customers to whom Seller's trademark symbol has been provided or who is permitted the display of such trademark of other identification of Seller require of such customers that they will while identifying the source of the products sold at their premise(s), or any location operated directly by Buyer, with Seller's trademark or other identification of Seller comply with the foregoing, and will incorporate in its arrangements with such customers the undertakings provided in this paragraph and will assist in the enforcement thereof. Such assistance includes but is not limited to the authorization to Seller to commence legal proceedings in Buyer's name for the purposes of enforcing Buyer's obligations in this paragraph.

To permit Seller to carry out its right and obligation to protect its trademark from diminution, dilution, or destruction by misuse or failure by those to whom permission to display it has been granted hereunder, Buyer agrees that it will at least annually provide Seller with a list of the names and addresses to which Buyer has provided Seller's trademark symbol or other identification of Seller and where such locations are displaying Seller's trademark or other identification of Seller as the source of the products sold, it being understood and agreed that a breach of any provision of this Section 13 is an event which is relevant to the franchise relationship as defined in the Petroleum Marketing Practices Act (15 U.S.C.A. §§2801 et seq.) and as a result of which termination of the franchise or non-renewal of the franchise relationship as defined is reasonable.

PROOF OF SERVICES ON ALL PARTIES

I, Peter L. Spinetta, declare and certify as follows:

That I am a citizen of the United States and am employed in the City of Oakland, County Alameda, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1800 Harrison, Suite 1771, Oakland, California, 94612.

I served three (3) copies of the foregoing WRIT OF CERTIORARI, on the following named persons by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Postal box at Oakland, California, on December 9, 1987, and February 5, 1988, addressed as follows:

JOHN R. REESE
WILLIAM BATES, III
McCutchen, Doyle, Brown & Enerson
Three Embarcadero Center
San Francisco, CA 94111

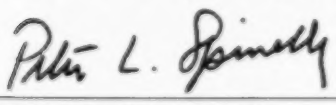
I served three (3) copies of the foregoing WRIT OF CERTIORARI, on the following named persons by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Postal box at Oakland, California, on December 9, 1987, and February 5, 1988, addressed as follows:

JOHN C. RENSHAW
Vargas & Bartlett
201 West Liberty Street
Reno, Nevada 89504

The foregoing are counsel of record for all parties required to be served pursuant to Rule 28.2 and 28.3 of the Revised Rules of the Supreme Court of the United States.

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 1988 at Oakland, California.



PETER L. SPINETTA